

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.606(b),)
Table of Allotments,)
TV Broadcast Stations)
(Pueblo, Colorado))

MM Docket No. 93-191
RM-8088

To: Chief, Allocations Branch
(Stop Code 1800D5)

**JOINT COMMENTS OF THE UNIVERSITY OF SOUTHERN COLORADO
AND SANGRE DE CRISTO COMMUNICATIONS, INC.**

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SUMMARY OF ARGUMENT

The channel exchange as initially proposed by the Petitioners is clearly consistent with the public interest. Exclusion of KTSC-TV's Cheyenne Mountain construction permit from the swap, however, would be contrary to the Commission's Rules -- which expressly permit channel exchanges to include construction permits -- and to precedent -- approving swaps involving outstanding construction permits.

That the permit in this case included a short-spacing waiver affords no basis to depart from established past practice. The waiver involved a technical rule, designed to avoid objectionable interference. As such, it was not, and could not have been, granted based upon the non-commercial identity of the party which sought it. The technical parameters of operation pursuant to the waiver will be identical no matter what the content of the programming being transmitted, so there is no non-content-based reason to withdraw the permit in conjunction with the swap. The swap must therefore be approved as initially proposed, that is, including the Cheyenne Mountain construction permit.

The translator service contemplated by the swap proposal further supports its approval. Translators will facilitate new non-commercial service to the Western Slope: service by translator facilities is a clear improvement to no service at all. KTSC-TV's service to Colorado Springs will remain unchanged: it has historically used a translator to enhance the technical quality of its service to that community and it will continue to do so following the swap. That this service will be from a translator rather than off-air from the station's primary transmitter is

immaterial in light of the fact that the service being provided is an enhancement to ameliorate shadowing rather than a replacement for missing off-air service.

Finally, it is clear that the University properly forbore from fully implementing the Cheyenne Mountain Permit. Not only would the University's interests be maximized by pursuing the swap, but also the public interest would be furthered by the benefits associated therewith. Thus, the University concentrated its efforts on this endeavor. Indeed, for the University to use public resources to build a station which it might never operate would have been both wasteful and imprudent. The delay in action on the swap proposal, which is clearly a matter beyond the University's control, is the reason that the Cheyenne Mountain Permit has not yet been implemented. Accordingly, the circumstances clearly warrant extension of the Cheyenne Mountain Permit.

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**JOINT COMMENTS OF THE UNIVERSITY OF SOUTHERN COLORADO
AND SANGRE DE CRISTO COMMUNICATIONS, INC.**

The University of Southern Colorado (the "University"), licensee of Station KTSC-TV, Channel 8, Pueblo, Colorado, and Sangre de Cristo Communications, Inc. ("SCC"), licensee of Station KOAA-TV, Channel 5, Pueblo, Colorado, by their attorneys, submit their joint comments in response to the Commission's Notice of Proposed Rule Making in the above-captioned proceeding.^{1/}

^{1/} Notice of Proposed Rule Making, MM Docket No. 93-191, released July 13, 1993 (the "Notice"). The Notice was issued in response to the Petition for Issuance of Notice of Proposed Rulemaking to Exchange Channels (the "Joint Petition") filed by the University and SCC (collectively, the "Petitioners").

Introduction

On September 8, 1992, the Petitioners filed their Joint Petition seeking Commission approval of a VHF intraband channel swap between the University and SCC. The proposed channel swap entails the following components:

- (a) amendment of the Television Table of Allotments whereby Channel 8, Pueblo, Colorado is designated as a commercial channel and Channel 5, Pueblo, Colorado is designated as a noncommercial channel;
- (b) modification of the license for KTSC-TV to specify operation on Channel 5 from KOAA-TV's present licensed transmitter site; and
- (c) modification of the license for KOAA-TV to specify operation on Channel 8 at a site atop Cheyenne Mountain authorized by an existing construction permit held by the University (the "Cheyenne Mountain Permit")^{2/}.

The Joint Petition describes in detail the public interest benefits associated with the proposed channel swap. Briefly, the University will receive \$1,000,000, which will be used to expand its network of television translators and provide first over-the-air service to the Western Slope of Colorado (where non-commercial service currently is only received via satellite delivery) and to broaden and expand KTSC-TV's noncommercial, educational television programming. The University also will receive technical operational benefits, namely, (i) a dual thirty kilowatt cross-polarized transmitter which will provide a stronger, better quality signal to Colorado Springs and Pueblo and will be more reliable than KTSC-TV's present transmitter; and (ii) Television Translator Station K30AA, Colorado Springs,

^{2/} See FCC File No. BPET-900122KE.

Colorado, which will facilitate coverage of a wider area of El Paso County and thus will enable the University to better serve Colorado Springs. SCC, after implementing the Cheyenne Mountain Permit to commence operations from the antenna farm used by other market commercial stations, will be able to provide full competitive service to the Colorado Springs-Pueblo television market.

In the Notice, the Commission concludes that the proposed channel swap, excluding the Cheyenne Mountain Permit, would be in the public interest. Petitioners submit that this exclusion is unwarranted and contrary to law and precedent, and urge the Commission to approve the swap as proposed.^{3/} The University hereby restates its intention -- and its commitment -- to operate KTSC-TV on Channel 5 if the channel exchange is authorized as proposed in the Joint Petition and discussed herein. SCC also hereby restates its intention -- and its commitment -- to operate KOAA-TV on Channel 8 if the channel exchange is authorized as proposed in the Joint Petition and discussed herein.^{4/} Finally, Petitioners have consistently

^{3/} As indicated herein, based on Commission policy and precedent, the Petitioners anticipated that the Cheyenne Mountain Permit would be a part of the Notice's channel exchange proposal. As demonstrated in the Joint Petition and confirmed herein, the Cheyenne Mountain Permit is inextricably linked to the public interest benefits associated with the proposed channel exchange. SCC's continued interest in pursuing the channel exchange is therefore conditioned upon the inclusion of the Cheyenne Mountain Permit in the swap proposal ultimately approved by the Commission. In this regard, on September 2, 1993, Petitioners responded to the Notice's exclusion of the Cheyenne Mountain Permit and filed an application seeking FCC consent to its assignment from the University to SCC.

^{4/} See Paragraph 13 of the Notice and Paragraph 2 of the Appendix thereto.

been, and remain, committed to taking all steps necessary to effectuate the proposed exchange as expeditiously as possible.

The Notice, requests comment on several specific issues of concern to the Commission: (a) modification of KOAA-TV's authorization to reflect the terms of the Cheyenne Mountain Permit; (b) KTSC-TV's post-exchange service to Colorado Springs; and (c) the potential gain in KTSC-TV's reception service through proposed translator service. These joint comments respond to these and other related issues and confirm that Petitioners' channel exchange proposal is fully consistent with the public interest and applicable requirements.

Commission Policy and Precedent Demand That
Authorized Facilities, Not Simply Operational
Facilities, Be Included In Intraband Channel Exchanges

At Paragraph 7 of the Notice, the Commission notes that since the University has not operated KTSC-TV from the site authorized by the Cheyenne Mountain Permit, it "believe[s] it appropriate to propose to modify SCC's authorization for Station KOAA-TV to specify the site in [the University's] outstanding license for Station KTSC(TV), and not its construction permit site." Such action, however, would be contrary to well-established Commission precedent and policy.

When the Commission amended Section 1.420 of its rules to establish its current procedures for intraband channel exchanges, it stated that such procedures

would not be limited to licensees but would also apply to permittees.^{5/} By specifically providing that its channel exchange procedures are available to permittees, the Commission clearly contemplated that a permittee of an unbuilt station could be a party to a proposed channel exchange.^{6/} It necessarily follows that construction permits for modification of licensed and operational facilities must also be affected by and transferred in connection with channel exchange proposals.^{7/} That the

5/ Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations (the "Channel Exchange Report & Order"), 59 RR 2d 1455, 1464 (1986), recon. denied 3 FCC Rcd 2517 (1988) ("The Commission also finds it unnecessary to limit the availability of this procedure to licensees ... Therefore, the rule will apply to permittees."). Furthermore, this intention is reflected in the plain language of subsection (h) of Section 1.420 which indicates that both licenses and permits can be the subject of channel exchange proposals. 47 C.F.R. §1.420(h) (1992).

6/ Although the Commission's discussion about the availability of the channel exchange procedures to permittees focused on the narrow issue of such exchanges being a means of providing noncommercial permittees with resources to construct and begin operating their stations, there is no indication that the only construction permits which may be the subject of an exchange are those for new stations. Existing stations can have the same need for the additional resources associated with an exchange as new and unbuilt stations. In this case, for example, the proposed channel exchange will afford the University monies to be used for noncommercial educational broadcasting purposes having at least the same, if not greater, public benefit as the previously authorized relocation of KTSC-TV's transmitter site to Cheyenne Mountain.

7/ Indeed, this is the only sensible result. What is the alternative? If outstanding construction permits are not included with the channel exchange, the swap proponents will then have to file assignment or modification applications where the Commission will be asked to re-address issues already considered and resolved either in the channel exchange rule making or the proceeding where the construction permit was granted. Notably, by granting the Cheyenne Mountain Permit in 1991, the Commission has already determined that operation of a television station on Channel 8 from the Cheyenne Mountain site was in the public interest; as a result, there is no reason to revisit that decision. See discussion infra. Given that no new issues would be addressed, this additional procedural step would only delay the implementation of

(continued...)

University holds a construction permit for unbuilt modifications to an operating facility rather than a license for the Cheyenne Mountain site does not mean that the permit should be completely excluded from the proposed channel exchange.

Review of other channel exchange proposals approved by the Commission under its current exchange procedures confirms that the Commission has routinely approved exchanges involving outstanding construction permits for unbuilt facilities.^{8/} In fact, the first intraband channel exchange proposal approved under these procedures involved commercial and non-commercial construction permits for unbuilt stations.^{9/} The exchange allowed the non-commercial permittee to receive funds to assist in constructing its station and the commercial permittee to relocate its station transmitter to the site used by the Chicago market commercial stations. Significantly, as in this case, the Gary commercial permittee would not have been able to move to that site due to minimum spacing restrictions; the exchange alone

^{7/} (...continued)

the exchange's public interest benefits and waste the resources of the FCC and those it regulates. Such duplicative efforts would only cause an unnecessary delay and a needless waste of resources, and, therefore would disserve the public interest.

^{8/} See e.g., Amendment of Section 73.606(b) (Gary, Indiana), MM Docket No. 86-80, RM-5303, 51 FR 30364, published August 26, 1986, petition for recon. dismissed 1 FCC Rcd 975 ["Gary, Indiana"]; Amendment of Section 73.606(b) (Clermont and Cocoa, Florida), 4 FCC Rcd 8320 (1989), recon. denied 5 FCC Rcd 6566 (1990); Amendment of Section 73.606(b) (Boca Raton and Lake Worth, Florida) (Notice of Proposed Rule Making), MM Docket No. 93-234, RM-8289, released August 26, 1993.

^{9/} Gary, Indiana, *supra*.

permitted this relocation.^{10/} The Commission approved the Gary channel exchange proposal, including the commercial permittee's preferred transmitter site, without any expression of concern about the fact that the preferred site was the subject of a construction permit for an unbuilt non-commercial station which the commercial permittee could not have used apart from the channel exchange.^{11/}

A very recent example of the Commission's inclusion of construction permits for unbuilt stations in channel exchanges is the Boca Raton and Lake Worth, Florida channel exchange proposal.^{12/} That proposal involves not one but two construction permits which are almost eight years old, have been extended, have been modified, but are not built. The Commission, nonetheless, has concluded as an initial matter that the proposed exchange would be in the public interest. Significantly, the Commission's approval of the channel exchange is not conditioned on either or both party's prior implementation of the subject construction permit(s).^{13/} Rather, the Commission requested submission of evidence that the parties would initiate service

^{10/} Even though this relocation did not involve a short-spacing waiver, the outcome is, nonetheless, the same: as a result of the channel exchange the commercial permittee was able to pursue service improvements which were previously unattainable because of the Commission's minimum spacing requirements. Ultimately, whether the result is achieved by benefiting from a previously acquired waiver or a change in the minimum spacing requirements due to the post-exchange channel of operation is of no decisional consequence.

^{11/} Gary, Indiana, supra note 8, 51 FR 30364.

^{12/} See Amendment of Section 73.606(b) (Boca Raton and Lake Worth, Florida), supra note 7, at ¶1.

^{13/} Id. at ¶ 7.

expeditiously after approval of the exchange including a schedule for the implementation of service by the stations involved in the swap.^{14/}

The Gary, Indiana and Boca Raton/Lake Worth, Florida channel exchanges both confirm that construction permits for unbuilt facilities are routinely included as part of such exchanges. Furthermore, no previously approved channel exchanges involving authorizations for unbuilt stations have included as a precondition of Commission approval that such permits must be implemented prior to approval.^{15/} That the University has not completed the KTSC-TV transmitter site relocation authorized by the Cheyenne Mountain Permit, therefore, does not provide any reason to limit the swap to KTSC-TV's licensed facilities.^{16/}

As shown above, neither Commission precedent nor the Commission's channel exchange procedures afford any basis for excluding the Cheyenne Mountain Permit from the channel exchange proposal solely because the authorized relocation of KTSC-TV's transmitter site has not been completed. Accordingly, approval of the channel exchange proposal must include modification of the license for Station

^{14/} Id.

^{15/} See e.g. Gary, Indiana, supra note 8; Amendment of Section 73.606(b) (Clermont and Coca, Florida), supra note 8; Amendment of Section 73.606(b) (Boca Raton and Lake Worth, Florida), supra note 8.

^{16/} Intraband channel exchanges like the one proposed by the Petitioners are functionally comparable to assignments of licenses for full-service stations. In that context, it is established Commission policy that any pending applications and requests for special temporary authority, and existing authorizations for associated auxiliary stations and outstanding construction permits follow the license for the full-service station. By analogy, Petitioners submit that the Cheyenne Mountain Permit should go to the entity authorized to operate on Channel 8 at Pueblo, Colorado.

KOAA-TV to reflect the transmitter site authorized under the Cheyenne Mountain Permit.

The University's Delay in Implementing the
Cheyenne Mountain Permit Was Due to
Circumstances Beyond Its Control

The Notice also raises questions concerning extension of the Cheyenne Mountain Permit. On February 16, 1993, the University filed an application seeking to extend the Cheyenne Mountain Permit pending the resolution of this proceeding (the "Permit Extension Application").^{17/} When the Joint Petition was filed in early September, 1992, it was anticipated in good faith that the Commission would take some action on the channel exchange proposal prior to the scheduled expiration date of the Cheyenne Mountain Permit and that the University would proceed accordingly. However, when the Permit Extension Application was filed, no action had been taken and, indeed, the Commission did not act on the Joint Petition until mid-June, 1993, almost five months after the Cheyenne Mountain Permit's scheduled expiration and over nine months after the proposed channel exchange was initially presented to the Commission.

^{17/} See FCC File No. BMET-930216KE. It should be noted that since October, 1992 Pikes Peak Broadcasting Company and KKTU, Inc., licensees of commercial television stations licensed to Colorado Springs, Colorado, have filed multiple pleadings challenging the continued validity of the Cheyenne Mountain Permit and the requested extension thereof. Petitioners have filed timely pleadings responsive to such challenges. On August 26, 1993, Petitioners filed a Joint Motion to Consolidate Proceedings seeking consolidation of all open proceedings relating to the Cheyenne Mountain Permit in this proceeding because of the effect of their resolution on the proposed channel exchange.

In the Notice, the Commission appears to question the University's commitment to implement the Cheyenne Mountain Permit because the operations authorized thereunder have not yet been instituted. The University has not altered its commitment to implement the Cheyenne Mountain Permit.^{18/} Indeed, the University's efforts prior to the filing of the Joint Petition confirm that commitment.^{19/} Not only did the University successfully prosecute its application for a Public Telecommunications Facilities Program Grant for \$368,007; it also entered into negotiations concerning a lease for a transmitter site atop Cheyenne Mountain.^{20/} And, as reflected in its most recent amendment to the Permit Extension Application, the University has also ordered equipment for the authorized

^{18/} Significantly, in response to challenges to its intentions about the Cheyenne Mountain Permit, the University has not wavered from its commitment to move forward with the authorized Station KTSC-TV transmitter relocation should the Commission not approve the Petitioners' channel exchange proposal. See "Joint Opposition to Petition to Revoke and Deny CP Extension", filed March 4, 1993 by the University and SCC, at 10.

^{19/} While the Joint Petition was pending before the Commission, however, the University considered it to be both reasonable and prudent not to expend additional efforts and monies in furtherance of the implementation of the Cheyenne Mountain Permit because the effectuation of the proposed channel exchange would result in changes to the technical operations of KTSC-TV due to the station's "new" transmitter and antenna (i.e. KOAA-TV's current equipment), and new channel of operation. However, because the Notice questioned the University's commitment to the Cheyenne Mountain Permit, the University has made additional efforts to reiterate its commitment.

^{20/} See "Joint Opposition to Petition to Deny Application for Extension of Construction Permit and Supplement to Petition for Issuance of Order to Show Cause Why Construction Permit Should Not Be Revoked", filed March 17, 1993 by the University and SCC, at 9.

modified Channel 8 operations and obtained an option to lease space on a new master broadcast tower under construction on Cheyenne Mountain.^{21/}

The University's commitment to the Cheyenne Mountain Permit thus remains unchanged. That the University did not actively pursue its specific implementation following the filing of the Joint Petition^{22/} reflected only its good faith and prudent evaluation of the best use of its resources. When presented with the opportunity to take advantage of the public interest benefits associated with the swap, the University decided to devote its resources to obtaining approval of the swap. It made no rational or business sense to pursue implementation of a permit which, if the swap were approved, would ultimately be SCC's responsibility.^{23/} Indeed, it would have been a wasteful use of public resources to do so: why should the University (a

^{21/} It also should be noted that even if the University had not pursued the proposed channel exchange, the Permit Extension Application would have been necessary nevertheless because the master broadcast tower currently under construction atop Cheyenne Mountain on which the KTSC-TV antenna would be located had not yet been completed on the scheduled expiration date for the Cheyenne Mountain Permit.

^{22/} It did, of course, pursue implementation of the authorization in the sense that it actively participated in the proceedings defending the validity of the permit and the public interest in the swap.

^{23/} The Commission has previously recognized that it is unreasonable for a permittee to be required to construct when the resolution of another issue directly impacts the planned operations for the proposed facility. See Nora Blatch Educational Communications Foundation, Inc., 50 RR 2d 362 (1981) (where permittee was awaiting approval of funding for substantial alterations of the operational plans authorized under the outstanding construction permit). Even though the Nora Blatch decision was before the Commission's 1985 revision of the standards for extensions of construction permits, it remains relevant, of course, to the determination of what is reasonable behavior by a permittee.

state institution) expend valuable resources to build and operate a facility that a private party would ultimately use?

The Notice cites New Dawn Broadcasting^{24/} as a source of guidance in determining whether the pendency of the swap rulemaking was a circumstance beyond the University's control warranting extension of the Cheyenne Mountain Permit. New Dawn Broadcasting, however, involved circumstances completely different from those present here and thus cannot control this decision. In that case, the permittee had acquired the permit by assignment after making specific representations to the Commission concerning construction and subject to a construction condition. The permittee sought its extension claiming that construction had not been completed due to the pendency of a rulemaking proposing the allotment of another VHF channel near the proposed station. Specifically, the permittee contended that a new channel allotment would restrict available alternative transmitter sites for its proposed station, although the permittee made no showing that its authorized site was either unavailable or unsuitable. Based upon the absence of such showing, the permittee's prior representation of a construction schedule and the fact that the allotment rulemaking was pending when the permittee acquired the station, the Commission deemed the delayed construction to be the result of matters within the permittee's control.

New Dawn Broadcasting is simply inapposite here. New Dawn Broadcasting involved a construction permit for a new station, not for modification of

^{24/} 2 FCC Rcd 4383 (1987).

the facilities of an existing station which continued to provide service. Thus, unlike the situation in New Dawn Broadcasting where the requested further delay would continue to deprive the public of any service, any delay in actual construction pursuant to the Cheyenne Mountain Permit has not affected existing service and has caused absolutely no public harm.^{25/}

Moreover, the New Dawn Broadcasting permittee's claims were premised on its speculation about the potential impact of the outcome of a proposed rulemaking (which was pending at the time of its acquisition of the station^{26/}). The premise of the permittee's concern - that the rulemaking might impact its choice of other transmitter sites - was totally unproven, as there was no showing that its existing site was unsuitable. The rulemaking thus had no established relationship to the permit. Here, by contrast, the rulemaking (which followed the permit's grant) is inextricably intertwined with the permit. New Dawn Broadcasting is clearly

^{25/} When the Commission revised its Section 73.3534 of its rules, which provides the circumstances warranting extensions of construction permits, it indicated that its rationale for reviewing extension applications more strictly was to expedite the permittee's initiation of service or, in the alternative, to make the authorization available to an entity willing and capable to readily provide such service. See Amendment of Section 73.3598 and Associated Rules Concerning the Construction of Broadcast Stations, 102 FCC 2d 1054, 1057 (1985). By contrast, the Cheyenne Mountain Permit does not authorize construction of a new station serving Colorado Springs but rather the modification of an already operating station. Moreover, the residents of Colorado Springs and the surrounding area are not deprived of any service as a result of a delay in the authorization's implementation. The rationale underlying Section 73.3534 therefore does not apply here.

^{26/} The New Dawn Broadcasting permittee thus accepted the risk of the rulemaking's outcome and made express representations to the Commission in that regard.

distinguishable from the circumstances presented by the requested extension of the Cheyenne Mountain Permit.

In sum, to penalize the University for failing to implement the Cheyenne Mountain Permit during the pendency of a proceeding in which the permit's ultimate operation and use is the critical issue would be to exalt form over substance. In view of the fact that the University did not control the timing of the resolution of this issue and that the Colorado Springs audience experienced no detriment during this delay, the University's actions with respect to the Cheyenne Mountain Permit should not adversely impact the Commission's approval of the Joint Petition's original swap proposal.

The Merits of the Short-Spacing Waiver Granted
to KTSC-TV Should Not Be Re-evaluated in this Proceeding

The Commission notes that it did not "believe it appropriate to determine at the rule making stage whether a similar request from a commercial licensee would be granted at the application stage."^{27/} As demonstrated above, Commission precedent demands that the Cheyenne Mountain Permit be included in the exchange. And in any event, it is clear that once the waiver has been determined to be consistent with the public interest, that determination would continue to be valid and binding, regardless of the commercial or non-commercial identity of its beneficiary. In consequence, any failure to include the Cheyenne Mountain Permit as part of the channel exchange would simply require SCC to reapply for a similar

^{27/} Notice, supra note 1, ¶7, n.5.

permit whose grant would be res judicata, which would clearly be a waste of resources not only for SCC but also the Commission.

Section 73.610, which specifies the minimum distance separation between stations, is designed to preserve the integrity of the Television Table of Assignments.^{28/} The purpose of the Table is to allow television stations to operate with maximum facilities without causing interference to other stations' operations.^{29/} In other words, Section 73.610, by its purpose and plain language, is a technical rule. It does not differentiate between stations based on their commercial or non-commercial status. Instead, its sole focus is to indicate the minimum separation necessary to prevent objectionable interference to neighboring stations. Electrical interference by a commercial station is not more (or less) objectionable than interference caused by a non-commercial station.^{30/}

It is well established Commission policy to "refus[e] to base waivers of rules designed to prevent interference upon non-technical considerations such as ownership or programming."^{31/} The Commission decision granting the short-

^{28/} See e.g. Sarkes Tarzian, Inc., 6 FCC Rcd 2465, 2466 (1991); The Outlet Co., 11 FCC 2d 528 (1968).

^{29/} Id.

^{30/} The record is clear that implementation of the Cheyenne Mountain Permit by either the University or SCC will not cause any actual interference to any operating station.

^{31/} See e.g. Open Media Corp., FCC 93-301, released June 15, 1993; Walter P. Faber, Jr., 4 FCC Rcd 5492, aff'd 6 FCC Rcd 3601 (1991); North Texas Media, Inc., 778 F.2d 28 (D.C. Cir. 1985); Fort Myers Broadcasting Co., 77 FCC 2d 863 (1980). Although these cases involve FM radio stations and the analysis of waivers (continued...)

spacing waiver associated with the Cheyenne Mountain Permit does not depart from this established Commission policy.^{32/} The Cheyenne Mountain Permit was granted because the Commission decided that any theoretical electrical interference caused by the proposed relocation of the Channel 8 transmitter site would not be inconsistent with the public interest.^{33/} Therefore, whether the authorization is implemented by the University or SCC is of no consequence in terms of the potential for interference: it remains the same.

Indeed, even if the Commission were to premise a technical rule waiver in whole or in part on the non-commercial status of the requesting party, it would, in essence, be holding that certain programming -- non-commercial -- is superior to or

31/ (...continued)

of other technical Commission rules, there is no Commission precedent indicating that a different standard is used for waivers of the Commission's technical rules pertaining to television stations.

32/ Although the non-commercial status of the licensee of KTSC-TV may have been noted by the Commission in reaching its decision to waive Section 73.610, such a passing reference in the text of the decision hardly constituted a determining, or even a material, factor in the Commission's decision. In fact, Commission precedent discussed above indicates that the contrary would be the case.

33/ In this regard, the circumstances under which the waiver was granted are instructive. The short-spacing authorized under the Cheyenne Mountain Permit is 5.5 miles to Station KJCT(TV), a commercial station licensed to Grand Junction, Colorado, and 8.1 miles to the reference point for a vacant allocation in Laramie, Wyoming. Notably, neither the licensee of Station KJCT(TV) nor the licensees of any of the other television stations in the Colorado Springs-Pueblo television market opposed the waiver request. Moreover, the Commission conditioned its grant of the Cheyenne Mountain Permit on the provision of equivalent protection to both Station KJCT(TV) and the Laramie, Wyoming allocation. Given the extremely mountainous terrain between the proposed Cheyenne Mountain site and Station KJCT(TV) and Laramie, Wyoming, combined with the equivalent protection condition, the Commission determined that the short-spacing authorized under the Cheyenne Mountain Permit was in the public interest

more worthy than other types of programming -- commercial programming. Such a distinction would be content regulation and thus, offensive to the First Amendment and contrary to the Communications Act^{34/} and judicial precedent.

Moreover, the Commission has approved a channel exchange where a commercial licensee was allowed to relocate its transmitter to the non-commercial permittee's authorized transmitter site although it would have been unable to relocate its transmitter to that site otherwise.^{35/} Consequently, the fact that SCC may not be able to locate Station KOAA-TV's transmitter atop Cheyenne Mountain absent the approval of the proposed channel exchange should not be an impediment to the inclusion of the Cheyenne Mountain Permit in the channel exchange proposal adopted by the Commission.^{36/} In short, the fact that the Cheyenne Mountain Permit was granted pursuant to a short-spacing waiver does not bar its inclusion in the exchange.

^{34/} 47 U.S.C. § 326 (1992).

^{35/} Gary, Indiana, supra.

^{36/} In fact, in the Channel Exchange Report & Order, the Commission contemplated that both the non-commercial and the commercial proponents of a channel exchange would receive service benefits from their proposal. 59 RR 2d at 1461 ("Intraband exchanges are desirable because such exchanges may benefit both of the stations involved, with consequent advantages for the public.") Here, by excluding the Cheyenne Mountain Permit, the Commission deprives SCC of the service benefits for KOAA-TV associated with the proposed channel exchange. Such a result is not in the public interest.

The University's Continued Service to Colorado Springs
Is Not Threatened By the Proposed Channel Exchange

The Notice also expresses the Commission's concerns about the replacement of the primary service to Colorado Springs authorized by the Cheyenne Mountain Permit by the translator service proposed by the Joint Petition.^{37/} Initially, the Commission implicitly suggests that the quality of service provided by KTSC-TV to Colorado Springs will decrease due to the Commission's approval of Petitioners' swap proposal because of the University's reliance on a translator whereas, under the Cheyenne Mountain Permit, no Colorado Springs translator is contemplated.^{38/} In this regard, it is important to focus upon the actual role played by a television translator station at Colorado Springs in KTSC(TV)'s service to Colorado Springs.^{39/} As a general matter, it should be noted that KTSC-TV's licensed facilities are able to provide primary service to Colorado Springs.^{40/} As a

^{37/} Notice, supra note 1, ¶ 7, n.5, ¶ 8.

^{38/} See Notice, supra note 1, at ¶ 7 n.5 (Commission noted that the Cheyenne Mountain Permit was obtained by the University, "in part on the need to continue providing public television service to Colorado Springs without relying on a translator to accomplish its goal").

^{39/} From 1971, when it began operation, to 1978, Station KTSC-TV served Colorado Springs using only its main transmitter, located just north of Pueblo. Being dissatisfied with the quality of the signal so provided, the University then applied for and obtained its first television translator station at Colorado Springs (on Channel 21) to supplement its off-air service to the community.

^{40/} KTSC-TV's licensed facilities provide a predicted Grade A coverage throughout Colorado Springs.

result of the shadowing occurring from KTSC-TV's licensed site, a Colorado Springs translator is used merely to augment KTSC-TV's coverage of Colorado Springs and the surrounding area rather than to provide primary service to Colorado Springs.^{41/}

Additionally, the University clearly would not take any steps which would result in degrading its service to Colorado Springs, especially in light of the fact that it is a significant part of KTSC-TV's home television market and the second largest metropolitan area in the state of Colorado.^{42/} The University would not seek to modify its operations if it believed that a modification presented the least realistic or practical prospect of a diminution of its service to Colorado Springs. And, given the nature of the service which Station KTSC-TV has historically provided to the Colorado Springs community, it is clear that the proposed channel exchange would not adversely impact KTSC-TV's non-commercial television service to the Colorado Springs community.

That KTSC-TV would continue to supplement its service to Colorado Springs via translator service would not cause any detriment to the service currently

^{41/} Significantly, the Commission has previously found the use of television translator or booster stations to be a sufficient alternative means to provide improved service to Colorado Springs. See tvUSA/Pueblo, Ltd., 4 FCC Rcd 598, 600 (Mass Media Bureau 1989), aff'd 5 FCC Rcd 7437 (1990) ("one of the traditional reasons for the use of translators is to fill in shadowed areas due to rough terrain").

^{42/} Colorado Springs is the county seat for El Paso County, the largest county in the Colorado Springs-Pueblo television market. See Broadcasting & Cable Yearbook 1993, Volume 1, Copyright 1993, Reed Publishing (USA) Inc.; 1991 Commercial Atlas & Marketing Guide (122nd ed., Rand McNally & Company 1991). Also, Colorado Springs is the second largest city in the state of Colorado, second to Denver. See 1991 Commercial Atlas & Marketing Guide.

provided. Since 1978, KTSC-TV consistently has used a translator station located at Colorado Springs in association with its operations -- first, on Channel 21 from 1978 to 1982 and then on Channel 53 from 1982 to 1988. However, in the fall of 1988, the University learned that its Channel 53 translator would be displaced by a new full-service station. Consequently, the University attempted to locate an alternative means of enhancing its service in the Colorado Springs area. It was able to enter into an agreement with SCC, whereby SCC's Television Translator K15BX would be used to transmit KTSC-TV's programming, thus avoiding disruption of the service previously provided by the displaced Channel 53 translator.

In sum, the history of KTSC-TV's operation indicates that it has always sought to serve Colorado Springs; that history confirms that the University would not take any action which it believed would materially adversely affect that service. During much of its operation such service has been provided by translators. In light of these considerations, the University's proposed translator service to Colorado Springs which is associated with the exchange should not be deemed a decrease in the quality of service; translators have provided consistent and continued service to the community for at least the past ten years.

The Joint Petition Properly Characterized the
Potential Gain In Noncommercial Reception Service
As a Public Interest Benefit of the Channel Exchange Proposal

At Paragraph 9 of the Notice, the Commission indicates that the projected service gains associated with the University's use of Translator K30AA and proposed expansion to the Western Slope of Colorado "may be too speculative to be

considered in the context of this rule making proceeding."^{43/} Petitioners submit that the University's proposed translator service is a clear public interest benefit associated with the channel exchange proposal.

As discussed above, during much of the University's tenure as licensee of Station KTSC-TV, translators have been used to enhance service to Colorado Springs. At the present time, the University relies on SCC's Translator K15BX as a temporary means to provide such service. Upon the approval of the proposed channel exchange, the University will again have a licensed translator to serve the Colorado Springs area. This is a clear benefit of the exchange.

Moreover, the swap will enhance service to the Western Slope of Colorado.^{44/} As described in the Joint Petition, the proposed service to the Western Slope will result in new off-the-air service to the following ten Colorado counties: Mesa County, Delta County, Montrose County, Ouray County, San Miguel

^{43/} Notice, supra note 1, at ¶9.

^{44/} The University already has initiated the application process for authority to construct the necessary translators. See FCC File Nos. BPTT-930330CC, BPTT-930330CA, BPTT-930330CB and BPTT-930330CD. On March 30, 1993, the University filed applications for new UHF translators at Grand Junction, Colorado, Cortez-Red Mesa, Colorado, Durango, Colorado and Ignacio, Colorado. These applications were tendered for filing on April 14, 1993. Broadcast Publications (Public Notice), Report No. 15505, at 8-9, released April 14, 1993. Moreover, the applications were accepted for filing by the Commission on July 16, 1993. Low Power/Television Translators: Proposed Construction Permits (Public Notice), Report No. GL93-4, released July 16, 1993. Predictably, on August 16, 1993, Pikes Peak Broadcasting Company filed a petition to deny these applications. On August 31, 1993, the University filed an opposition to the petition to deny. Petitioners' Joint Motion to Consolidate Proceedings filed on August 26, 1993 also includes these television translator applications. Low Power/Television Translators: Proposed Construction Permits (Public Notice), Report No. GL93-4, released July 16, 1993.